90-1068

No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL RIFLE ASSOCIATION,
SOUTH CAROLINA SHOOTING ASSOCIATION,
GREENVILLE GUN CLUB,
PALMETTO GUN CLUB,
ROBLEY MOORE, WILLIAM P. GOODMAN,
CALIFORNIA RIFLE AND PISTOL ASSOCIATION,
TEXAS STATE RIFLE ASSOCIATION, and
UNIFIED SPORTSMEN OF FLORIDA,
Petitioners,

v.

NICHOLAS F. BRADY, in his official capacity as Secretary of the Treasury of the United States; and STEPHEN E. HIGGINS, in his official capacity as Director, Bureau of Alcohol Tobacco and Firearms, U.S. Department of the Treasury,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule of lenity and of strict construction against the government, or the rule of deference to agency construction, applies to regulations promulgated under ambiguous terms in the criminal code, Title 18, United States Code.

2. Whether, in enacting the Firearms Owners' Protection Act of 1986, Congress intended that the courts defer to the agency in the issuance of regulations which expand the reach of the statute.

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NICHOLAS F. BRADY, in his official capacity as Secretary of the Treasury of the United States; and STEPHEN E. HIGGINS, in his official capacity as Director, Bureau of Alcohol Tobacco and Firearms, U.S. Department of the Treasury,

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 914 F.2d 475 (4th Cir. 1990). The opinion is reproduced in the Appendix (hereafter "App.") at 1a. The judgment of the United States District Court dated

August 16, 1989 is unpublished and is reproduced in App. 25a.

JURISDICTION

On September 13, 1990, the Court of Appeals affirmed in part and reversed in part the judgment of the District Court, thereby upholding the validity of two regulations and a portion of a third, and invalidating two regulatory provisions. On October 11, 1990, the Court of Appeals denied plaintiffs' petition for rehearing and suggestion of rehearing (or hearing) in banc.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The text of the following statutes and regulations are reproduced in the Appendix:

§ 1, Firearms Owners' Protection Act, P.L. 99-308, 100 Stat. 449 (May 19, 1986)
18 U.S.C. § 922(c)
18 U.S.C. § 923(c)
18 U.S.C. § 923(d)(1)
18 U.S.C. § 923(g)(1)(A)
18 U.S.C. § 923(j)
18 U.S.C. § 924(a)
18 U.S.C. § 926(a)
27 C.F.R. § 71.41(d)(2)(iii)(B)
27 C.F.R. § 178.11 ("business premises")
27 C.F.R. § 178.100
27 C.F.R. § 178.125(e)
27 C.F.R. § 178.125a(a)

STATEMENT OF THE CASE

Proceedings in the Courts Below

This case is a challenge to regulations adopted by the Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms on the basis that such regulations are inconsistent with the Firearms Owners' Protection

Act, P.L. 99-308, 100 Stat. 449 (1986). Plaintiffs include the National Rifle Association; the shooting sports associations of South Carolina, Florida, Texas, and California; two local gun clubs; a gun show promoter; and a gunsmith. Defendants are the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco, and Firearms.

The Firearms Owners' Protection Act made numerous amendments to the Gun Control Act of 1968, necessitating the issuance of new regulations. After a written comment period, the defendants published their final regulations on March 31, 1988.

Plaintiffs filed their verified complaint for declaratory and injunctive relief and motion for preliminary injunction in the U.S. District Court for the District of South Carolina, Charleston Division, on September 29, 1988. On October 25, 1988, defendants filed a motion to dismiss or, in the alternative, for summary judgment. A non-jury trial, over which Hon. Solomon Blatt, Jr., presided, was held on December 12, 1988. By judgment dated August 16, 1989, the Court granted defendants' motion for summary judgment and sustained the validity of the following regulations: 27 C.F.R. §§ 178.11 ("business premises"), 178.100(b) ("gun shows"), 178.125(f) (collector recordkeeping), and 178.125(e), .125a (personal collection). However, the court found to be arbitrary and capricious and unlawful, and declared void and permanently enjoined enforcement of a portion of 27 C.F.R. § 178.11 (definition of "manufacture"). App. 25a-26a.

On October 6, 1989, the plaintiffs filed a notice of appeal from the judgment with the U.S. Court of Appeals for the Fourth Circuit. On September 13, 1990, the Court of Appeals issued an opinion affirming the validity of 27 C.F.R. §§ 178.11 ("business premises") and 178.100(b) ("gun shows"), and upheld a portion of

§ 178.125a (personal collection). The court declared invalid another portion of § 178.125a, and voided § 178.125(f) (collector recordkeeping).

Facts

Plaintiffs the National Rifle Association ("NRA"), the South Carolina Shooting Association, the Greenville Gun Club, the Palmetto Gun Club, the California Rifle and Pistol Association, the Texas State Rifle Association and the Unified Sportsmen of Florida are membership organizations devoted to protecting the lawful use and enjoyment of firearms. These associations and clubs represent over three million individual and affiliate members, who include hunters, competitors, dealers, and collectors. Plaintiffs NRA and the California Rifle and Pistol Association submitted extensive written comments on the proposed regulations which later became part of the final rule challenged herein.

Plaintiff Robley Moore is a licensed dealer of firearms whose trade is gunsmithing. Plaintiff William P. Goodman is a licensed dealer in the business of organizing and sponsoring commercial (for profit) gun shows.

Defendant Nicholas F. Brady, Secretary of the Treasury of the United States, and Stephen E. Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury, adopted and are charged with the administration of the regulations being challenged in this case.

On May 19, 1986, the President signed the Firearms Owners' Protection Act, P.L. 99-308. On October 29, 1986, ATF published a notice of proposed rulemaking. 51 F.R. 39612. Plaintiff NRA submitted extensive comments. ATF, which received 1510 written comments with 2583 additional signatures, published the final regulations on March 31, 1988. 53 F.R. 10480.

Comments were received which criticized four of the substantive regulations attacked in the case at bar. The basis of the criticism may be summarized as follows: [1]

1. The requirement in 27 C.F.R. § 178.11 that business premises be "open to the public" failed to consider that licensed firearms dealers such as part-time gunsmiths (like plaintiff Moore) and distributors who do business only with other licensees, have no need to allow the public on their premises.[2] This regulation prompted the most frequent criticism from the public, particularly small businesses. 53 F.R. 10481 (Mar. 31, 1988).

2. The reference to sponsorship of "gun shows" by certain nonprofit organizations in 27 C.F.R. § 178.100 led to inferences that commercial gun shows (such as that sponsored by plaintiff Goodman)[3] were not recognized. ATF asserted that it interprets for-profit gun shows as consistent with the regulation.[4]

3. 27 C.F.R. § 178.125(f) was criticized because it required licensed collectors to inventory and record curio and relic firearms possessed before the license was obtained.[5]

4. 27 C.F.R. § 178.125(e) and .125a were criticized by licensees who may occasionally sell a firearm from their personal collection and who would be burdened by extra recordkeeping requirements or face felony charges.[6]

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[1] Defendants' Exhibit 2 at trial includes the 1510 comments. Plaintiffs' Exhibits B and D contain comments specifically addressed to the regulations at issue here.

[2] See Appendix in the Court of Appeals, at 289-90, 295-96.

[3] *Id.* at 292-93.

[4] *Id.* at 315-17.

[5] NRA Comments, Plaintiff's Exhibit B.

[6] Appendix in the Court of Appeals, 301-02.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO CLARIFY WHETHER THE RULE OF LENITY IN INTERPRETATION OF AMBIGUOUS TERMS IN THE CRIMINAL CODE IS SUPERSEDED BY THE RULE OF DEFERENCE TO AGENCY INTERPRETATIONS, AND TO PROVIDE GUIDANCE TO THE COURTS IN THE INTERPRETATION OF THE FIREARMS OWNERS' PROTECTION ACT OF 1986

The Court should grant certiorari to clarify whether the courts must defer to an agency's interpretation of an ambiguous criminal statute, rather than interpret any ambiguity against the government, in a civil case involving the agency's issuance of regulations. The Court should also clarify whether Congress intended such deference in enactment of the Firearms Owners' Protection Act of 1986, which is part of Title 18, the criminal code.

The Court of Appeals found three criminal provisions of the Firearms Owners' Protection Act to be ambiguous —whether a gun show must be sponsored by certain organizations, whether business premises must be open to the public, and whether a dealer must keep records of personal firearms not obtained from inventory. The Court proceeded to defer to the agency's interpretation of these ambiguous provisions.

This Court has held that agency regulations under a criminal statute are *not* entitled to deference, and that the rule of lenity requires that statues be interpreted in favor of potential criminal defendants. *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954). This Court has also held that ambiguities in the Gun Control Act must be interpreted in favor of defendants. *United States* v. *Bass*, 404 U.S. 336, 347 (1971). In 1990, this Court reaffirmed that, even in civil cases, criminal statutes must be construed strictly against the government, and that the rule of

deference does not apply. *Crandon* v. *United States*, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990).

In *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court held that the courts must follow the clear intent of Congress, but must defer to an agency's reasonable construction of an ambiguous statute. While this Court has not explicitly stated that *American Broadcasting* is still good law in light of *Chevron*, its *Crandon* decision certainly implies so.

The courts of appeals have been eroding the gains intended by Congress in passage of the Firearms Owners' Protection Act by deferring to agency interpretations. Besides *NRA* v. *Brady* in the Fourth Circuit, the Eleventh Circuit has done this in three cases to date, one of which is pending before this Court.[7] Deference to ATF, particularly in reference to syntax in a criminal statute, is contrary to both the proper role of the judiciary and to the intent of the Firearms Owners' Protection Act.

The Court of Appeals' decision squarely conflicts with *Crandon* v. *United States*, 110 S.Ct. 977, 108 L.Ed.2d 132 (1990) and with other applicable decisions of this Court and the Courts of Appeals of other circuits, which have held that, even in civil cases, criminal statutes must be interpreted according to the rule of lenity, and not according to the rule of deference to the agency. The regulatory issues affect federal firearms licensees numbering in the hundreds of thousands, yet the decision defers to agency interpretation of criminal statutes governing these licensees. Congress sought to decrease regulation of these licensees through passage of the Firearms Owners' Protection Act of 1986. Thus, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

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[7] *Farmer* v. *Higgins*, 907 F.2d 1041, 1045 (11th Cir. 1990), *petition for certiorari filed* (U.S. October 10, 1990) (No. 90-600). The other two cases are cited *infra* at 20-21.

I. THE AGENCY DEFERENCE DOCTRINE IN *CHEVRON U.S.A.* v. *NATURAL RESOURCES DEFENSE COUNCIL*, 467 U.S. 837 (1984) DOES NOT SUPERSEDE THE RULE OF LENITY SET FORTH IN *FCC* v. *AMERICAN BROADCASTING CO.*, 347 U.S. 284 (1954) AND ITS PROGENY REGARDING AMBIGUITIES IN THE CRIMINAL CODE

A. The Court Concedes That The Statutory Provisions Concerning Gun Shows, Business Premises, And Recordkeeping May Be Reasonably Interpreted In Two Ways

The Court of Appeals does not argue that the statutory provisions at issue are subject to only one clear interpretation. Instead, it carefully explains how they are ambiguous and could be reasonably interpreted in two different ways. Each of the three regulations impose a gloss on the statutes which would make otherwise legal conduct into felonies.

First, the Court of Appeals acknowledges that "gun show"[8] may be interpreted in one of two conflicting ways:

> We think it uncertain as a matter of syntax whether the "sponsored by" clause refers only to "events" or

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[8] 18 U.S.C. § 923(j) provides:

> A licensed importer, licensed manufacturer, or licensed dealer may, under rules or regulations prescribed by the Secretary, conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for *a gun show or event sponsored by any national, State, or local organization*, or any affiliate of any such organization devoted to the collection, competitive use, or other sporting use of firearms in the community, and such location is in the State which is specified on the license. (Emphasis added.)

By contrast, the regulation states that "a gun show or an event is *a function sponsored by*" the above listed organizations. 27 C.F.R. § 178.100(b). Thus, the regulation adds a gloss to the statute by adding the term "function," and by causing the "sponsored by" clause to modify "gun show."

> to both "gun shows" and "events." In such a situation, a court must defer to the agency's regulation so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The regulation at issue here is a permissible construction of 18 U.S.C. § 923(j). Since a modifying phrase may apply to one or both of the two preceding nouns separated by an "or," it is reasonable to conclude from the structure of the statutory language that "a gun show" as well as "event" is modified by the term "sponsored by." (App. 10a-11a.)

Under the Court's reading, a dealer who sells inventory at a gun show not sponsored by certain organizations, is guilty of the felony of selling firearms off of the business premises. 18 U.S.C. §§ 922(c), 923(j), 924(a). Under the equally reasonable reading that "gun show" is not modified by "sponsored by," a dealer who sells inventory at a gun show not sponsored by certain organizations is not guilty of anything.

Secondly, concerning the regulatory definition of "business premises," the Court of Appeals stated:

> In order to obtain a license to conduct business, a firearms importer, manufacturer, or dealer must have "premises from which he conducts business." 18 U.S.C. § 923(d)(1)(E)(i).... The regulation specifies that "[a] private dwelling, no part of which is open to the public, shall not be recognized as coming within the meaning of the term." 27 C.F.R. § 178.11.
>
> The NRA argues that this regulation is contrary to 18 U.S.C. § 923(d)(1)(E)(i). It contends that "business premises" is a self-defining term, the definition of which simply is any place where a licensee does business, whether that place be open to the public or not....
>
> We cannot agree that "business premises" is a self-defining term. While the definition argued for by the NRA is probably the broadest possible meaning of the term, the definition provided in the BATF

> regulation is quite reasonable. . . . Thus, we think the Secretary has defined an undefined and ambiguous term in the statute in a reasonable manner. *See Chevron*, 467 U.S. at 844. (App. 8a-9a.)

With the regulatory gloss on the statute, gunsmiths, distributors, and other legitimate dealers who are not "open to the public" are subject to prosecution for felony violations. A licensee who sells at a location other than the "business premises" (§ 922(c)) is punishable under § 924(a)(1)(D). A person who represents that he has "premises from which he conducts business" when applying for a license, can be prosecuted for making false statements under § 924(a)(1)(A). Without the regulatory gloss, however, such persons have committed no crime.

Thirdly, 18 U.S.C. § 923(c) (second sentence)[9] exempts a licensee from *any* recordkeeping (other than as

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[9] 18 U.S.C. Section 923(c), beginning with the second sentence, provides:

> Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of *a personal collection of firearms*, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer. *If any firearm is so disposed of by a licensee within one year after its transfer from his business inventory* into such licensee's personal collection or if such disposition or any other acquisition is made for the purpose of willfully evading the restrictions placed upon licensees by this chapter, then *such firearms* shall be deemed part of such licensee's business inventory, except that any licensed manufacturer, importer, or dealer who has maintained *a firearm as part of a personal collection for one year* and who sells or otherwise disposes of such firearm shall record the description of the firearm in a bound volume, containing the name and place of residence and date of birth of the transferee if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: Provided, That no other recordkeeping shall be required. (Emphasis added.)

would apply to a nonlicensee)[10] regarding "a personal collection of firearms." Such a firearm might have been obtained before becoming licensed, or later as a gift, inheritance, or from another private source. § 923(c) (third sentence) requires *full* recordkeeping "if any firearm is so disposed of by a licensee within one year after its transfer from his business inventory," and *limited* recordkeeping for a licensee "who has maintained a firearm as part of a personal collection for one year . . . ." Whether the "firearms" in the second sentence of § 923(c) are the same "firearms" in the third sentence is a question for the Court, not the agency. The issue reduces to: Is the third sentence restricted to firearms obtained from inventory, or does it include all firearms, so as to eviscerate the second sentence? 27 C.F.R. §§ 178.125(e) and 178.125a mandate the latter.

This is an issue related to syntax and plain English, and not to ambiguous words within the agency's expertise. However, the Court of Appeals states:

> We think the Secretary's interpretation of the statute as reflected in the regulations is a permissible one. While the language of the statute may be ambiguous as to whether the requirement that licensees record transactions involving personal firearms held for one year refers to all personal firearms of a licensee or only to those personal firearms transferred from a dealer's business collection, it is not unreasonable for the Secretary to conclude that the requirement applies to the former. (App. 14a.)

Under the above reading, a dealer who sells a personal collection firearm not obtained from inventory without keeping records is guilty of a crime. 18 U.S.C. §§ 922(m), 923(g)(1)(A), 924(a). Under an equally

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[10] Nonlicensees are required to complete forms certifying eligibility to purchase a firearm from a dealer. The dealer keeps the records; the nonlicensee is not required to keep any record. *See* 18 U.S.C. § 922(a)(6); 27 C.F.R. § 178.124.

reasonable alternative reading, such person is not guilty of any crime.

Accordingly, the Court of Appeals recognized that each of the three provisions at issue here are reasonably susceptible to two interpretations. Even though these provisions are part of the criminal code, the Court deferred to the agency's interpretation.

B. Deference To The Agency, And Rejection Of The Rule Of Lenity, In Interpretation Of A Criminal Statute Is Inconsistent With *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) and *Crandon v. United States*, 110 S.Ct. 997 (1990)

The Court of Appeals declined to apply the rule of lenity, and deferred to the agency, even though the provisions at issue are part of the criminal code and the Court found the statutes to be ambiguous. The Court's methodology is squarely inconsistent with *Crandon* v. *United States*, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) and its predecessors, which held that the rule of lenity, and not the rule of deference, applies in construction of a criminal statute in the context of civil litigation. Specifically, the Court of Appeals stated:

> The NRA also suggests that BATF's power to promulgate regulations is limited by the fact that the Gun Control Act is a criminal statute. The NRA contends that the rule which directs that ambiguity in criminal statutes be resolved in favor of lenity requires the invalidation of all regulations that do not adopt the narrowest possible construction of the Act. Many of the cases, however, on which the NRA relies in making this argument involve the application of the rule of lenity in criminal prosecutions and are simply inapposite to questions of deference to agency regulations. *See United States v. Bass*, 404 U.S. 336 (1971); *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988) . . . . In addition, while it is possible that willful violation of the reg-

> ulations at issue here might lead to criminal prosecutions, the regulations are in the main licensing requirements, and the government properly notes that any disputes over their scope or meaning are far more likely to arise in contests over license application, renewal, or revocation than in a criminal courtroom. The usual level of deference is therefore appropriate. (App. 7a-8a n.3.)

Nothing in the record supports the Court of Appeals' assertion that the regulations are licensing requirements unlikely to lead to criminal prosecutions. In fact, the main prosecutions noted in Congress as ATF abuses in need of correction by the Firearms Owner's Protection Act were those involving sales of personal firearms off of the licensed premises (of which a "gun show" is an extension), and failure of licensees to keep records of sales of personal collection firearms.[11]

Like the disjunctive "gun show or event sponsored by" clause in § 923(j), *United States* v. *Bass*, 404 U.S. 336 (1971) involved a disjunctive clause which was unclear

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[11] The Court of Appeals itself cites two cases in which selling firearms away from the business premises and without recordkeeping led to felony convictions. App. 11a, citing *United States* v. *Endicott*, 803 F.2d 506, 510-11 (9th Cir. 1986); *United States* v. *Currier*, 621 F.2d 7, 9 (1st Cir. 1980). Similar prosecutions include *United States* v. *Scherer*, 523 F.2d 371, 374-75 (7th Cir. 1975); *United States* v. *Newman*, 628 F.2d 362, 365-67 (5th Cir. 1980; *United States* v. *Faurote*, 749 F.2d 40, 41-42 (7th Cir. 1985); *United States* v. *Boulin*, 707 F.2d 511 (4th Cir. 1983) (opinion not published). Congress amended § 923(c) in part due to the prosecution of dealer and police officer Richard Boulin. As explained in the Firearms Owners Protection Act: Report of the Senate Judiciary Committee, 98th Cong., 2d Sess. 13 (1984):

> The effect is to clearly authorize licensees to maintain private firearms collections which are completely independent of their business operations. . . . The Committee has heard testimony from one licensee who, on the one hand, was told by Federal agents that sales from his personal collection did not have to be recorded, and on the other hand, was *arrested, charged and convicted for failure to record such sales.* (Emphasis added.)

about whether a phrase at the end qualified each preceding term or only the last term.[12] Since the statutory language was inconclusive, the Court decided: "Given this ambiguity, we adopt the narrower reading. . . . 'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* at 347. The rule of lenity applies "when choice has to be made between two readings of what conduct Congress has made a crime. . . ." *Id.* Where "Congress has not 'plainly and unmistakably' . . . made it a federal crime" to engage in certain conduct, then "there is ambiguity in a criminal statute [and] doubts are resolved in favor of the defendant." *Id.* at 348. This is precisely the situation in the case at bar.[13]

Crandon v. *United States*, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) applied the rule of lenity under a criminal statute to a civil case,[14] and rejected any rule of deference to the administrative agency. This Court held:

> Because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of

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[12] The provision punished a felon "who receives, possesses or transports in commerce or affecting commerce" a firearm. The issue was whether "in commerce or affecting commerce" modified "transports" only, or whether it also modified "receives" and "possesses." *Id.* at 339.

[13] The *Bass* lenity rule was applied in *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) to a statute with two possible meanings and where "either interpretation would accord with ordinary usage." *Id.* at 424.

Bass and *Liparota* were both applied, in turn, to a criminal statute made ambiguous because it was unclear whether an adverb modified one or more clauses, in *United States* v. *Nofziger*, 878 F.2d 442, 446, 452 (D.C. Cir. 1989).

[14] The United States filed a complaint for damages against a government contractor which made severance payments to ex-employees who later entered government service. The Court rejected the government's argument that civil liability applied here through 18 U.S.C. § 209(a), which prohibits bribes to government employees.

> lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [a statute] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota* v. *United States*, 471 U.S. 419, 427 . . . (1985); see also *United States* v. *Bass*, 404 U.S. 336, 347-348 . . . (110 S.Ct. at 1001-02).

This Court concluded its opinion by repeating:

> Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of [the statute] remains, it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent. 110 S.Ct. at 1007.[15]

The concurring opinion by Justice Scalia, with whom Justices O'Connor and Kennedy joined, explains in more detail:

> The vast body of *administrative* interpretation that exists . . . is not an administrative interpretation that is entitled to deference under *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 . . . (1984). . . . We have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference. Besides

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[15] The Court also rejected the use of legislative history to expand the coverage of a statute. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of the statute broader than that clearly warranted by the text." 110 S.Ct. at 1002-03. Quoting this statement, *Hughey* v. *United States*, 110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990) notes that "long-standing principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."

> being unentitled to what might be called *ex officio* deference under *Chevron*, this expansive administrative interpretation of [the statute] is not even deserving of any persuasive effect. . . . Thus, to give persuasive effect to the Government's expansive advice-giving interpretation of [the statute] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity. *Id.* at 1011-12.

It is noteworthy that this Court in *Crandon*, a civil case, invoked its *Bass* holding that criminal statutes must be construed according to the rule of lenity. By contrast, in the case at bar, the Court of Appeals rejected the *Bass* rule because this is a civil case. (App. 7a-8a n.3.) The Court of Appeals decision is inconsistent with *Crandon*, which requires the rule of lenity and rejects deference to an agency in interpretation of a criminal statute, even as applied to civil matters.[16]

The fact that regulations are involved here makes no difference. Courts have invalidated agency regulations in criminal cases because they went beyond the statute and because of the *Bass* lenity rule.[17] The same result would

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[16] The *Bass* rule of lenity was applied in a declaratory judgment action to reject ATF interpretations concerning the Gun Control Act and the Organized Crime Control Act in *Bingham, Ltd.* v. *United States*, 724 F.2d 921, 924-25 (11th Cir. 1984). "It is clear that the terms of a statute cannot have one meaning when a criminal prosecution is brought and another when a civil action is brought." *United States* v. *One (1) Lot of $24,900.00 in U.S. Currency*, 770 F.2d 1530, 1533 (11th Cir. 1985), citing *United States* v. *Hess*, 317 U.S. 537, 542 (1943). *See D & W Food Centers, Inc.* v. *Bloch*, 786 F.2d 751, 757-58 (6th Cir. 1986) (rejecting deference under *Chevron* in civil action involving Federal Meat Inspection Act because of *Bass* rule that "courts are bound to construe narrowly the applicability of any criminal statute."); *Springfield Industries Corp.* v. *United States*, 663 F. Supp. 128, 136 (CIT 1987) (*Bass* lenity rule invoked to render declaratory judgment invalidating Treasury regulation under Anti-Apartheid Act).

[17] *United States* v. *Smith*, 812 F.2d 161, 166-67 (4th Cir. 1987) (invalidation of Federal Aviation Administration regulation);

have been required had the issue arose in a civil context. This is exactly what occurred in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954), which invalidated regulations under the criminal code as beyond the statutory prohibition, because "penal statutes are to be construed strictly."

In *American Broadcasting*, the FCC sought, by regulation, to make "give-away" programs illegal, while the statute only made gambling-related broadcasts illegal. ABC sought an order enjoining the regulations.

The FCC was empowered to "make such rules and regulations . . . as may be necessary in the executions of its functions. . . ." *Id.* at 290 n.7. Just as ATF administers licensing and the Department of Justice handles prosecutions under the Gun Control Act, the FCC and the Department enforced the statutes concerning communications. "But the Commissioner's power is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [the statute], the Commission cannot employ the statute to make them so by agency action." *Id.* at 290.

This Court held that a criminal statute must be construed the same in both civil and criminal proceedings, i.e., strictly against the government and in favor of persons regulated by the statute:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one

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United States v. *Zheng*, 590 F.Supp. 274, 280-82 (D.N.J. 1984) (invalidation of regulation under Arms Export Control Act).

Deference to administrative interpretations of criminal statutes was rejected due to the *Bass* lenity rule in *United States* v. *O'Brien*, 686 F.2d 850, 852-53 (10th Cir. 1982) (statute concerning food stamps changes "is ambiguous. The statute can be read either way. . . . It is well established that ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity and construed strictly against the government.")

> construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly. *Id.* at 296.

The rule of strict construction requires that power to promulgate regulations under a criminal statute—such as the Gun Control Act—be narrowly construed, and that conduct not clearly made criminal by statute cannot be made so by regulation. As noted by this Court in *American Broadcasting*, Congress had not specifically prohibited the conduct in question by statute. "The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power." *Id.* ATF's behavior is no different.

The *American Broadcasting* precedent has been repeatedly invoked to curtail administrative attempts to stretch the law. *E.g.*, *Guardians Assn.* v. *Civil Service Commission*, 463 U.S. 582, 614 n.2 (1983) (O'Connor, J., concurring) ("agency cannot make illegal by regulation what is legal under the statute"); *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971) (rejecting agency interpretation of statute); *Peters* v. *Hobby*, 349 U.S. 331, 342-43 (1955) ("the Board thus sought to do by regulation precisely what it was not permitted to do under the Order."); *North American Van Lines* v. *United States*, 243 F.2d 693, 696-97 (6th Cir. 1957).

Congress clearly articulated in plain English the recordkeeping requirements for licensed dealers and collectors, the entitlement of licensees to sell at gun shows, and the requirement of business premises. *Chevron*

U.S.A. v. *National Resources Defense Council*, 467 U.S. 837 (1984) held that the deference rule has no place where the statute is clear. *Chevron* provides the following two-part test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43 (emphasis added).

All of the cases cited by the Court of Appeals for deference concern civil statutes with no criminal ramifications. App. 5a-6a, citing *Chevron*, *supra* (environmental regulations applicable to states); *Motley* v. *Heckler*, 800 F.2d 1253, 1254-55 (4th Cir. 1986) (social security); *NLRB* v. *United Food & Commercial Workers*, 484 U.S. 112, 123 (1987) (labor relations); *Sullivan* v. *Everhart*, 110 S.Ct. 960, 964 (1990) (social security); *Wilson* v. *Lyng*, 856 F.2d 630, 636 (4th Cir. 1988) (food stamps).[18]

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[18] It goes without saying that the deference rule applies to ambiguous *terms* in civil statutes, not to syntax, and only where Congress intended the agency to define the term. *E.g.*, *Chevron U.S.A.*, *supra*, 467 U.S. at 840 (agency construction of statutory term "statutory source"). Since quesions of syntax require a determination of "what the law is," it is exclusively "the province" of the courts under Article III of the Constitution to analyze syntax. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Were the courts to do other-

In sum, the Court of Appeals' decision is inconsistent with this Court's decisions in *Crandon* and *American Broadcasting*, that criminal statutes must be construed according to the doctrine of lenity, even in civil matters. The rule of deference does not apply to criminal statutes, but applies only to ambiguous terms (and not syntax) in civil statutes.

II. IN ENACTING THE FIREARMS OWNERS' PROTECTION ACT OF 1986, CONGRESS DID NOT INTEND THE COURTS TO DEFER TO THE AGENCY IN THE ISSUANCE OF REGULATIONS THAT EXPAND THE REACH OF THE STATUTE

A. Two Circuits Have Now Misapplied the Agency Deference Rule to the Firearms Owners' Protection Act, a Criminal Statute

The Court of Appeals rejected plaintiffs' arguments that the statutory language and legislative history of the Firearms Owners' Protection Act removed much of the agency's discretion and are incompatible with agency deference. Like the Fourth Circuit in the case at bar, the Eleventh Circuit has misapplied the deference rule to ATF's interpretation of the Firearms Owner's Protection Act.[19] *Gun South, Inc.* v. *Brady*, 711 F. Supp. 1054, 1064 (N.D. Ala. 1989) ("Because the statute here being construed [18 U.S.C. § 925(d)(3)] contains a criminal penalty provision, the statute *must* be strictly construed in favor of the potential violator under the well-recognized

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wise, they would essentially be delegating the judicial power to the executive branch.

[19] Ironically, a court rejected the deference doctrine as applied to ATF *before* passage of the Firearms Owners' Protection Act. *United States* v. *Green*, 515 F.Supp. 517, 520-21 (D.Md. 1981) held that "the agency's interpretation [of the Gun Control Act] is contrary to the clear intent of Congress with regard to the statutory provisions in question, as expressed by the plain language of the statute, and the Court therefore concludes that the agency interpretation is entitled to no deference whatsoever."

rule of lenity."), *rev'd* 877 F.2d 858, 861, 864-65 (11th Cir. 1990) (2-1 opinion) (ignoring rule of lenity and asserting, "We must defer to the Bureau's interpretation of the Gun Control Act and its regulations"); *Farmer* v. *Higgins*, 907 F.2d 1041, 1045 (11th Cir. 1990) (reversing district court ruling against agency based on plain language of Firearms Owners' Protect Act,[20] because "we defer to the Bureau's interpretation of [18 U.S.C.] § 922(o), embodied in its implementing regulations at 27 C.F.R. § 179.105"), *petition for cert. filed* (U.S. Oct. 10, 1990) (No. 90-600); *Gilbert Equipment Co., Inc.* v. *Higgins*, 709 F.Supp. 1071, 1075, 1077-78 (S.D.Ala. 1989) (deference to ATF in construction of 18 U.S.C. § 925(d)(3)), *aff'd* 894 F.2d 412 (11th Cir. 1990) (*mem.*).

Accordingly, this Court should grant certiorari to decide an important question of federal law concerning a newly enacted statute.

B. Congress Amended 18 U.S.C. § 926 To Insure That Regulations be the Least Restrictive Method of Carrying Out the Law

In enacting the Firearms Owners' Protection Act, Congress intended to eliminate most of the regulations adopted by the Bureau of Alcohol, Tobacco and Firearms under the Gun Control Act. Accordingly, Congress deleted the discretionary language in 18 U.S.C. § 926(a) that "the Secretary may prescribe such rules and regulations as *he deems reasonably necessary* to carry out the provisions of this chapter," and inserted the following words: "The Secretary may *only* prescribe such rules and regulations as *are necessary* to carry out the provisions of this chapter . . . ." (Emphasis added.) [21]

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[20] See Appendix at 18a-19a, 32a-33a, filed with petition for writ of certiorari in *Farmer* v. *Higgins*.

[21] The regulations at issue are purportedly promulgated under the authority of 18 U.S.C. § 926. (53 F.R. 10490). *United States* v.

Clearly, the term "only" contains an admonition that the least restrictive method be adopted, and then only when strictly necessary. Deletion of the subjective term "*he deems* reasonably necessary," and insertion of the objective terms "as *are* necessary," removed any allowance for discretion. The Court of Appeals' opinion that the provision made no change from prior law is tantamount to nullifying the amendment to § 926(a). "We may not assume Congress to have done a 'useless, ineffective or absurd thing' [when it enacted legislation]." *Farmer* v. *Higgins*, *supra*, 907 F.2d at 1044 (commenting on Firearms Owners' Protection Act).

The only change in § 926(a) addressed by the Court of Appeals is the substitution of "necessary" for "reasonably necessary," which a Senate report called "redundant." App. 7a, citing S.Rep. No. 98-583, 98th Cong., 2d Sess. 27 (1984). Yet this Senate report also contained a "Regulatory Impact Statement," which promised "a reduction in regulation by the agencies enforcing this law of law-abiding citizens. . . ." *Id.* at 30. Nonetheless, the Court of Appeals concluded:

> The change in language in § 926 surely counsels BATF not to stray from the directives of the statute, but it is not of the decisive import that the NRA contends.
>
> . . . It remains difficult to conclude that the alteration in § 926 was intended to install the courts

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Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) states concerning such a general authorization statute:

> The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner has promulgated [regulations] interpreting this statute only under his general authority to "prescribe all needful rules and regulations." 26 U.S.C. Sec. 7805(a). Accordingly, "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."

> as primary arbiters of regulatory necessity or that the principles of *Chevron* do not apply to this litigation. (App. 6a-7a.)

While the change speaks for itself, the legislative history confirms the intent to do away with most regulations. In floor debates, Senator Hatch explained: "Regulations imposed must be only those necessary to the purpose of the law. These are reasonable reforms, aimed at keeping the law and its enforcement on the right track—aimed at the real criminal." 131 CONG.REC., 99th Cong., 1st Sess., at S9124 (July 9, 1985). Hatch inserted a fact sheet which stated: "Regulations.—The Protection Act requires that regulations issued be only those necessary to enforcement of the Act. (Current law allows any regulations the Secretary thinks reasonably necessary, a broader standard.)" [22] *Id.* at S9125.

The most complete discussion of the amendment to § 926 was set forth by Senator Mattingly, who stated:

> I am pleased that at last the Senate will have the opportunity to vote on legislation which is designed to protect the constitutional rights of gun owners and to remove unnecessary Federal burdens and restrictions on law-abiding citizens, while protecting and advancing legitimate law enforcement efforts.
>
> For some years now, momentum has been gathering to reduce these burdens by imposing limits on the agency's tendency to regulate every activity. If anyone doubts the need for these limits, I suggest that he take a look at the U.S. Code and the Code of Federal Regulations. That comparison clearly demonstrates what to me is a disturbing fact—that administrative regulation far outweighs legislation in vol-

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[22] Senator McClure noted that this provision "requires that the regulation be necessary, rather than 'reasonably necessary' as determined by BATF." The Firearms Owners' Protection Act: Hearings before the Committee on Judiciary, U.S. Senate, 97th Cong., 1st and 2nd Sess., at 49 (1982).

> ume and in detail. This is disturbing because it is not how the system is meant to work. It is not career bureaucrats but individuals elected by the people who are charged with the responsibility of creating the rules which govern the lives of our citizens. But bureaucrats and regulators increasingly have assumed this responsibility.
>
> Gun owners have seen the danger of agency lawmaking. In the late seventies, for example, they were nearly forced into a computerized gun registration devised by an agency. . . .
>
> Senate bill 49 provides needed guarantees against similar incidents of regulatory overstepping in the future. It alters the existing grant of authority to a Secretary to make whatever rules he deems reasonably necessary to carry out the law. Under S. 49 *regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment. The deletion of the term "reasonably" narrows the boundaries of an agency's discretion,* discretion which has been at times exercised in an abusive manner. The practical effect of this clarification is to ensure that regulations are necessary to carry out the terms of the law and are in fact based on the law itself. In addition, *the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law.* S. 49 subjects the agency rather than the law-abiding citizen to stricter liability. *Id.* at S9171 (emphasis added).

As is clear, amended § 926 was intended to prevent the regulations from far outweighing the statute in volume and detail, to eliminate any discretion by the Secretary, and to require that the regulations be the least restrictive means of enforcing the law. Senator Kennedy concurred with the above objectives:

> Mr. President, we all share the basic goal of the sponsors of this bill—to remove unnecessary regulatory burdens on the purchase of firearms by hunters and others for sporting purposes, and by law-

> abiding citizens seeking weapons for self protection. We should eliminate excessive redtape and regulations affecting the sale of rifles, shotguns and sporting weapons. *Id.* at S9134.[23]

In an effort to retain most existing regulations, the Hughes bill reported to the House would not have amended § 926. Report 99-495, 99th Cong., 2d Sess., at 42-43 (1986). The House rejected this in favor of the Volkmer language, clearly intending that the new regulations must be brief and least restrictive. However, members expressed apprehension that the new regulations would not conform to the reform legislation:

> Mr. MARLENEE. One other question: The people who perpetrated this harassment, are these the same people who would develop the regulation for the computation and investigation of backgrounds and backdoor registration and compilation of reports?
>
> Mr. VOLKMER. These were BATF people back in the early years, back in the seventies.
>
> Mr. MARLENEE. These are the same people who would develop the regulations.
>
> Mr. VOLKMER. Yes. 132 CONG.REC., 99th Cong., 2d Sess., at H1652 (April 9, 1986).

The intent to cut regulations to the bare bones was stressed by Congressman Bevill:

> Current gun control laws have created mountains of bureaucratic redtape. Some of these provisions serve no legitimate purpose and sometimes law-abiding gun owners are subjected to harassment by Federal officials. . . .
>
> I believe the Volkmer substitute will shift the focus of the Federal law enforcement effort away from a

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[23] Senator Kasten noted that the bill "makes several useful changes in the scope of Federal regulations affecting firearms." *Id.* at S9165. Senator Stevens agreed that the bill "focuses on areas of regulatory abuse resulting from the Gun Control Act. . . . Pervasive regulation is not the answer to the growing incidence of violent crime." *Id.*

> regulatory mentality and toward an actual law enforcement strategy aimed at the criminal. *Id.* at H1664.

The 1968 language that "the Secretary may prescribe such rules and regulations as *he deems reasonably necessary* to carry out the provisions of this chapter" first appeared in the Federal Firearms Act of 1938. *See* Firearms: Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess., at 3 (1937). Congressman Pehr G. Holmes denied that broad powers were being conferred on the Secretary by this provision and stated that "he cannot tell anyone what to do under rules and regulations." *Id.* at 24.

When this and like provisions were proposed to be enacted in the legislation that became the Gun Control Act of 1968, the National Shooting Sports Foundation charged that the bill "gives the Secretary of the Treasury unlimited authority to set up rules and regulations as he so chooses." Senator Dodd strongly denied "that the Secretary of the Treasury has unlimited authority." Federal Firearms Act: Hearings Before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Committee, U.S. Senate, 89th Cong., 1st Sess., at 326 (1965). Senator Dodd inserted into the record an analysis of the Foundation's charges by the Treasury Department which stated:

> This statement is a ridiculous distortion implying that the Secretary has dictatorial powers. *S. 1592 spells out all the requirements imposed on dealers. The regulations to be prescribed by the Secretary can only fill in the details.* . . . The NRA and other gun interests have in the past taken full advantage of such opportunity to express their views regarding proposed regulations relating to firearms.
>
> If a regulation were outside the statutory standards established by the Congress for the Secretary's

> action, or if it were not reasonably necessary to carry out the provisions of the statute, or if it were arbitrary or capricious, or if it were unreasonably burdensome, or if it were irregularly issued, *it would be declared invalid by the courts. Id.* at 328 (emphasis added.)

As early as 1980, Senator Steven D. Symms noted how the discretionary language of § 926 as passed in 1968 led to regulations which were abusive and far too many in number:

> In haste to pass the law, regulatory details were put in abeyance. General powers were given to what we now know as Treasury's Bureau of Alcohol, Tobacco and Firearms—BATF. The Congress naively assumed that in issuing regulations "reasonably necessary to carry out the provisions of" the law, BATF would pay due regard to the purpose of the law, which specifically steered clear of any attempt to place undue or unnecessary burdens on law-abiding citizens or to discourage private ownership and use of firearms for any lawful purpose.
>
> Since enactment of the Gun Control Act of 1968, the BATF has disregarded congressional intent in its issuance of mandates which place a near stranglehold on firearms dealers, collectors, and the Nation's 60 million gun owners. BATF has established a series of technical requirements affecting commerce in firearms, the violation of which—under the Gun Control Act is a felony. Firearms Enforcement Efforts of the BATF: Hearing before the Subcommittee on Crime, House Judiciary Committee, 96th Cong., 2d Sess., 13 (1981).

After detailing numerous regulations which deterred persons from becoming licensees and required useless paperwork, Symms added: "By abusing its power to issue regulations, the BATF has created needless and expensive paperwork, all designed to discourage lawful gun ownership and use. None of these rules and regulations can be deemed 'necessary to implement and effectu-

ate the provisions' of Public Law 90-618 as spelled out in the purpose of the Gun Control Act." *Id.* at 14-15. Detailing some of the reforms proposed in what would become the Firearms Owners' Protection Act, Symms further stated:

> Legislation is needed to force BATF to allow adequate public and congressional response to proposed regulations and thus prevent BATF from exceeding the authority Congress intended to give it back in 1968. We need legislation, in short, to prevent abuse of power by BATF and to make it clear that gun ownership, acquisition, and use are not in themselves suspect acts. *Id.* at 15.

In a general way, Congress enacted the above intent as law. Section 1 of the Firearms Owners' Protection Act provides:

> CONGRESSIONAL FINDINGS—The Congress finds that—
>
> (1) the rights of citizens—
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or

> any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." § 1, P.L. 99-308, 100 Stat. 449 (1986).

Thus, the Firearms Owners' Protection Act was enacted to protect persons such as the plaintiffs from overreaching by ATF. "Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity." *Independent Insurance Agents* v. *Board of Governors of Federal Reserve System*, 838 F.2d 627, 632 (2nd Cir. 1988).

In sum, in enacting the Firearms Owners' Protection Act of 1986, Congress never intended to allow the agency to expand the statutory terms beyond their clear language. Since two circuits have now adopted rules of deference that would allow this, the Court should grant certiorari to decide this important issue of federal law.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-3345

NATIONAL RIFLE ASSOCIATION, a not for profit corporation; SOUTH CAROLINA SHOOTING ASSOCIATION, a not for profit corporation; GREENVILLE GUN CLUB, a corporation; PALMETTO GUN CLUB, a not for profit association; ROBLEY MOORE; WILLIAM P. GOODMAN; CALIFORNIA RIFLE AND PISTOL ASSOCIATION, a not for profit corporation; TEXAS STATE RIFLE ASSOCIATION, a not for profit association; UNIFIED SPORTSMEN OF FLORIDA, a not for profit association,

Plaintiffs-Appellants,

versus

NICHOLAS F. BRADY, SECRETARY, DEPARTMENT OF THE TREASURY; STEPHEN E. HIGGINS, DIRECTOR OF BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. DEPARTMENT OF TREASURY, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Charleston
Solomon Blatt, Jr., Senior District Judge
(CA-88-2518-4-8)

Argued: April 2, 1990 Decided: September 13, 1990

Before SPROUSE and WILKINSON, Circuit Judges, and GARBIS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part and reversed in part by published opinion. Judge Wilkinton wrote the opinion, in which Judge Sprouse and Judge Garbis joined.

ARGUED: Stephen Porter Halbrook, Fairfax, Virginia, for Appellants. Ira C. Lupu, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: Stuart M. Gerson, Assistant Attorney General, Michael Jay Singer, Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Jack B. Patterson, Imelda Koett, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Washington, D.C., for Appellees.

WILKINSON, Circuit Judge:

In this case, we must determine the validity of certain firearms regulations promulgated by the Secretary of the Treasury pursuant to the Gun Control Act of 1968, Pub. L. No. 90-618, as amended by the Firearms Owners Protection Act of 1986, Pub. L. No. 99-308, presently codified at 18 U.S.C. §§ 921 *et seq.* The National Rifle Association, along with several other groups and individuals involved with the use and promotion of firearms, challenges the regulations as inconsistent with the Firearms Owners Protection Act. The district court upheld all four regulations at issue here as compatible with the statutory mandate. We hold that two of the four regulations are consistent with the terms of the statute, that the third regula-

tion is in part consistent but in part inconsistent with the statute, and that the fourth regulation is inconsistent with the plain language of the statute. Accordingly, we affirm in part and reverse in part the judgment of the district court.

I.

Congress passed the Gun Control Act of 1968 in order to regulate interstate firearms transactions, primarily through licensing requirements on firearms businesses. Licensees may include importers, manufacturers, dealers, and collectors of firearms. The Secretary of the Treasury was authorized to promulgate regulations to facilitate the enforcement of the Gun Control Act. This responsibility was delegated within the Department of the Treasury to the Bureau of Alcohol, Tobacco, and Firearms (BATF).

In 1986, Congress passed the Firearm Owners Protection Act, Pub. L. No. 99-308 (FOPA), which amended several provisions of the Gun Control Act. FOPA was designed to protect the legitimate interests of firearms owners "while preserving the necessary statutory foundation for legitimate law enforcement efforts." S. Rep. No. 98-583, 98th Cong., 2d Sess. 1 (1984).[1] It was intended to reduce the regulatory burden on law-abiding owners of firearms without eviscerating BATF's effectiveness in combatting violations of the firearms laws.

After passage of FOPA, the Secretary of the Treasury initiated a comprehensive review of all regulations implementing the Gun Control Act and issued temporary regulations, effective November 15, 1986, for the enforcement of the amended Act. Some of the temporary regulations were merely repromulgations of regulations which the Secretary had issued prior to the passage of FOPA, while others were new in content. In addition, the Secretary

[1] There was no Senate Report on Pub. L. No. 99-308. S. Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub. L. No. 99-308.

issued a Notice of Proposed Rulemaking requesting comments on the temporary regulations. BATF received over 1500 written comments, including those of the National Rifle Association (NRA) and other interested parties. BATF refused the request of certain of these parties for an oral hearing. On March 31, 1988, the Secretary published the regulations in their final form.

On September 29, 1988, the NRA, six other gun associations, a gun show promoter, and a gunsmith (hereinafter collectively referred to as the NRA) filed suit challenging several of the newly published regulations as contrary to FOPA. They also contended that the Gun Control Act ensured an opportunity for an oral hearing, which had not been afforded them by BATF. On cross-motions for summary judgment, the district court upheld all but one of the challenged regulations and ruled that the NRA was not entitled to an oral hearing.

The NRA appeals.[2]

II.

We must first address the appropriate standard of review to govern our examination of the regulations at issue. In the usual challenge to an agency's construction of a statute it administers, our review is conducted according to the standards set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and its progeny. The Supreme Court has made plain that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also*

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[2] The government does not appeal the district court's invalidation of that portion of 27 C.F.R. § 178.11 defining the term "manufacture."

Motley v. Heckler, 800 F.2d 1253, 1254-55 (4th Cir. 1986) ("[W]here Congress has entrusted an agency with implementation of a statutory scheme, that agency's interpretation of the statutory terms is entitled to substanial deference."). Thus, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency," *Chevron*, 467 U.S. at 844, but instead must uphold the agency's interpretation as long as it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *see also Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990).

Here, however, the NRA contends that through an amendment to the Gun Control Act contained in FOPA Congress intended to restrict severely BATF's ability to promulgate regulations and to dispense with the deference that courts would customarily accord those regulations. Prior to passage of FOPA, the Gun Control Act's enabling provision stated that "[t]he Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter." FOPA amended this provision to read: "The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter. . . . ." 18 U.S.C. § 926. The NRA argues that the change of language in the enabling provision evinces a congressional intent to eliminate most of the regulations adopted by BATF, preserving only those that are truly necessary to furtner the purposes of the Gun Control Act. The NRA also points to a number of statements in the legislative history of FOPA by individual members of Congress in support of its interpretation of the significance of the change of language in § 926. Thus, the NRA maintains that we should not defer to BATF's interpretation of the Gun Control Act as manifested in its regulations, but rather should strike down the regulations if we do not find them strictly necessary and the least restrictive means of accomplishing the purposes of the Act.

The change in language in § 926 surely counsels BATF not to stray from the directives of the statute, but it is not of the decisive import that the NRA contends. Under the NRA's reading of the amended § 926, it would be the courts, and not BATF, that would have responsibility to determine when a regulation is "necessary" to carry out the purposes of the Gun Control Act. The amended language, however, retains the regulatory function in the Secretary. It does not divest him of his primary role in the implementation of this legislation. BATF, moreover, is better equipped than the courts for such an endeavor, having the technical expertise essential to determinations of statutory enforcement. *See Wilson v. Lyng*, 856 F.2d 630, 636 (4th Cir. 1988). Also, BATF, as opposed to the courts, is "in a position to provide nationally uniform interpretations of statutory terms." *Id.* Because § 926 authorizes the Secretary to promulgate those regulations which are "necessary," it almost inevitably confers some measure of discretion to determine what regulations are in fact "necessary." Absent a clearer message from Congress that it wishes courts to replace BATF in this role, we are hesitant to work a fundamental alteration in the relationship between the agency and the courts.

The argument that BATF retains statutory discretion to promulgate regulations is bolstered by the specific grants of rulemaking authority in a number of the areas implicated by this litigation. FOPA specifically provides that a licensee "shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Secretary may by regulations prescribe." 18 U.S.C. § 923(g)(1)(A). Similarly, 18 U.S.C. § 923(g)(2) provides that "[e]ach licensed collector shall maintain in a bound volume the nature of which the Secretary may by regulations prescribe, records of the receipt, sale, or other disposition of firearms." Finally, 18 U.S.C. § 923(j) directs that licensees may

temporarily conduct business at gun shows and other events "under rules or regulations prescribed by the Secretary." Such grants of authority make it unlikely that Congress intended in its amendment of § 926 to displace the deference generally due an agency charged by Congress with implementing its directives.

Finally, the Report of the Senate Judiciary Committee, which introduced the change in § 926, explained that deletion of "reasonably" from the enabling provision was merely intended to remove redundant language:

> Section 106 of S. 914, as reported, amends 18 U.S.C. 926, which deals with rules and regulations. . . . Sections 106(2) and (3) provide that the Secretary shall promulgate only such regulations as are necessary (as opposed to the redundant "reasonably necessary") to carry out the provisions of the Gun Control Act.

S. Rep. 98-583, 98th Cong., 2d Sess. 27 (1984). Although such legislative history is rarely conclusive, a Committee Report, which "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation," *Zuber v. Allen*, 396 U.S. 168, 186 (1969), is not to be subordinated to the statements of individual members of Congress. For all of the above reasons, it remains difficult to conclude that the alteration in § 926 was intended to install the courts as primary arbiters of regulatory necessity or that the principles of *Chevron* do not apply to this litigation.[3]

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[3] The NRA also suggests that BATF's power to promulgate regulations is limited by the fact that the Gun Control Act is a criminal statute. The NRA contends that the rule which directs that ambiguity in criminal statutes be resolved in favor of lenity requires the invalidation of all regulations that do not adopt the narrowest possible construction of the Act. Many of the cases, however, on which the NRA relies in making this argument involve the application of the rule of lenity in criminal prosecutions and are simply inapposite to questions of deference to agency regulations. *See*

With these principles in mind, we shall proceed to address in turn each of the challenged regulations.

III.

A.

Since its original passage in 1968, the Gun Control Act has required that in order to obtain a license to conduct business, a firearms importer, manufacturer, or dealer must have "premises from which he conducts business." U.S.C. § 923(d)(1)(E)(i). FOPA did not eliminate this requirement, which exists so that regulatory authorities will know where the inventory and records of a licensee can be found. In 1968, the Secretary promulgated a regulation defining the term "business premises" as used in the statute. *See* 33 Fed. Reg. 18,557 (December 14, 1968). The relevant portion of that regulation remains unchanged after FOPA. It specifies that "[a] private dwelling, no part of which is open to the public, shall not be recognized as coming within the meaning of the term." 27 C.F.R. § 178.11.

The NRA argues that this regulation is contrary to 18 U.S.C. § 923(d)(1)(E)(i). It contends that "business premises" is a self-defining term, the definition of which simply is any place where a licensee does business, whether that place be open to the public or not. Thus, the NRA maintains, the regulation is an impermissible expansion on the requirement in the statute. The NRA also complains that the regulation will interfere with activities such as gunsmithing or brokering between li-

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United States v. Bass, 404 U.S. 336 (1971); *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988); *United States v. Schultheis*, 486 F.2d 1331 (4th Cir. 1973). In addition, while it is possible that willful violation of the regulations at issue here might lead to criminal prosecutions, the regulations are in the main licensing requirements, and the government properly notes that any disputes over their scope or meaning are far more likely to arise in contests over license application, renewal, or revocation than in a criminal courtroom. The usual level of deference is therefore appropriate.

censees which might occur at a private dwelling not open to the public.

We cannot agree that "business premises" is a self-defining term. While the definition argued for by the NRA is probably the broadest possible meaning of the term, the definition provided in the BATF regulation is quite reasonable. To define "business premises" so as to except private dwellings not open to any member of the public comports with a common understanding of the term. Additionally, the requirement of some minimal public access has the benefit of creating a locus which defines the business to customers and facilitates regulators' inspection of the licensee's inventory and records. Thus, we think the Secretary has defined an undefined and ambiguous term in the statute in a reasonable manner. *See Chevron*, 467 U.S. at 844.

In addition, the regulation need not impinge on activities such as gunsmithing or brokering between licensees in a private dwelling. Contrary to the NRA's contention, the regulation does not require licencees who work out of private dwellings simply to throw open their homes to the general public or even to observe regular business hours. BATF rulings make clear that licencees need only open that portion of their homes in which they do business and only "to the clientele that the business is set up to serve." ATF Rul. 73-13, 1973 ATF C.B. 92. Thus, licensees need not fear that their homes will be transformed into public thoroughfares. The promulgation of 27 C.F.R. § 178.11 is a valid exercise of the Secretary's power, and is reasonable and consistent with 18 U.S.C. § 923(d)(1)(E)(i).

B.

FOPA provides that a licensee may conduct business temporarily at "a gun show or event sponsored by any national, State, or local organization . . . devoted to the collection, competitive use, or other sporting use of firearms in the community." 18 U.S.C. § 923(j). This pro-

vision is an exception to the general rule that licensees may only conduct business from their "business premises." After passage of FOPA, the Secretary promulgated a regulation defining "gun show or event" as follows:

> A gun show or an event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.

27 C.F.R. § 178.100.

The NRA again contends that the Secretary has impermissibly defined a self-defining term in the statute. It argues that the term "gun show" is self-defining, and means simply a display of firearms in a civic building or similar location, whereas the term "event" needs qualification. From this argument, it follows that the "sponsored by" clause in the statute refers only to the term "event," and not to the term "gun show." Thus, according to the NRA, the Secretary has misinterpreted 18 U.S.C. § 923(j) by requiring that "gun show" and "events," rather than only "events," be sponsored by one of the types of sponsoring organizations listed in the statute.

We think it uncertain as a matter of syntax whether the "sponsored by" clause refers only to "events" or to both "gun shows" and "events." In such a situation, a court must defer to the agency's regulation so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The regulation at issue here is a permissible construction of 18 U.S.C. § 923(j). Since a modifying phrase may apply to one or both of the two preceding nouns separated by an "or," it is reasonable to conclude from the structure of the statutory language that

"gun show" as well as "event" is modified by the term "sponsored by." Moreover, it is questionable whether "gun show" could fairly be described as a self-defining term. To consider it such, the Secretary argues, would create significant problems of statutory interpretation and enforcement. For example, any licensee seeking to evade the general rule that firearms business must be conducted from "business premises" could simply designate his temporary display of firearms a "gun show" rather than an "event" and thereby remove himself from the statute. We think it reasonable that the Secretary would interpret the "sponsorship" requirement to apply to both "gun shows" and "events," and to prevent vitiation of the "business premises" requirement.

C.

Prior to the passage of FOPA, licensed firearms dealers were required to record the sale or other disposition of firearms held in both their business inventories and their personal collections. *See United States v. Endicott*, 803 F.2d 506, 510-11 (9th Cir. 1986); *United States v. Currier*, 621 F.2d 7, 9 (1st Cir. 1980). Initially, FOPA altered this scheme by providing that, with respect to their personal collections, licensees need only comply with those restrictions applicable to any other person who disposes of a firearm. The statute read as follows:

> Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer. If any firearm is so disposed of by a licensee within one year after its transfer from his business inventory into such licensee's personal collection or if such disposition or any other acquisition is made for the purpose of willfully evading the restrictions placed upon li-

> censees by this chapter, then such firearm shall be deemed part of such licensee's business inventory.

Pub. L. No. 99-308, section 103(4). Concerned that the statute as written might contain a loophole through which licensees could dispose of firearms from their personal collections without leaving any records, Congress amended the statute on July 8, 1986, by appending the following language to the end of the prior formulation of the statute:

> except that any licensed manufacturer, importer, or dealer who has maintained a firearm as part of a personal collection for one year and who sells or otherwise disposes of such firearm shall record the description of the firearm in a bound volume, containing the name and place of residence and date of birth of the transferee if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: *Provided*, That no other recordkeeping shall be required.

Pub. L. No. 99-360, section 1(c), presently codified together with Pub. L. No. 99-308, section 103(4), at 18 U.S.C. § 923(c).

Thus, 18 U.S.C. § 923 requires that licensees keep two sets of record books: § 923(g)(1)(A) requires that they maintain a business bound book in which to record receipt and disposition of firearms in the business inventory, and § 923(c) requires that they maintain a personal bound book in which to record disposition of personal firearms. The Secretary has implemented these statutory requirements in a number of regulations. The § 923(g)(1)(A) requirement that licensees keep a business bound book is implemented through 27 C.F.R. § 178.125(e), which provides:

> [E]ach licensed dealer shall enter into a record each receipt and disposition of firearms. In addition, be-

> fore commencing or continuing a firearms business, each licensed dealer shall inventory the firearms possessed for such business and shall record same in the record required by this paragraph.

The § 923(c) requirement that licensees keep a personal bound book is implemented through 27 C.F.R. § 178.125a, as follows:

> [A] licensed manufacturer, licensed importer, or licensed dealer is not required to record on a firearms transaction record, Form 4473, the sale or other disposition of a firearm maintained as part of the licensee's personal firearms collection: *Provided*, That (1) the licensee has maintained the firearm as part of such collection for 1 year from the date the firearm was transferred from the business inventory into the personal collection or otherwise acquired as a personal firearm, (2) the licensee recorded in the bound record prescribed by § 178.125(e) the receipt of the firearm into the business inventory or other acquisition, (3) the licensee recorded the firearm as a disposition in the bound record prescribed by § 178.125(e) when the firearm was transferred from the business inventory into the personal firearms collection or otherwise acquired as a personal firearm, and (4) the licensee enters the sale or other disposition of the firearm from the personal firearms collection into a bound record, under the format prescribed below . . . .

The NRA asserts that taken together, 27 C.F.R. § 178.125(e) and 27 C.F.R. § 178.125a improperly expand upon 18 U.S.C. § 923. It contends that the regulations create recordkeeping requirements where none were contemplated by the statute with respect to transactions in which a licensee sells a firearm from his personal collection which he obtained either before he was a licensee or as a nonlicensee. The NRA maintains that no recordkeeping whatsoever is required for transactions involving such firearms, but only for those transactions involving

personal firearms transferred from the business collection.

We disagree. We think the Secretary's interpretation of the statute as reflected in the regulations is a permissible one. While the language of the statute may be ambiguous as to whether the requirement that licensees record transactions involving personal firearms held for one year refers to all personal firearms of a licensee or only to those personal firearms transferred from a dealer's business collection, it is not unreasonable for the Secretary to conclude that the requirement applies to the former. The regulations are consistent with the purpose of the statutory provision. The regulations require that licensees record the purchase of all firearms in their business bound books, and that they then record in their business bound books the transfer of any firearms to their personal collections. They also require that licensees demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms. The regulations ensure that firearms kept in the personal collection are bona fide personal firearms, and they minimize the opportunity for licensees to evade the statute's recordkeeping requirements for business firearms by simply designating those firearms "personal firearms" immediately prior to their disposition. In addition, the recordkeeping requirements contained in the regulations provide a means for the Secretary to verify that personal firearms were actually held for a year by a licensee prior to sale. Thus, we think the regulations at issue here are both "rational and consistent with the statute." *United Food & Commercial Workers*, 484 U.S. at 123.

The NRA also complains that the Secretary has by regulation required that licensees record in their personal bound books information not called for by 18 U.S.C. § 923 (c). The statute specifies that a licensee

> shall record the description of the firearm in a bound volume, containing the name and place of residence

> and date of birth of the transferee if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: *Provided*, That no other recordkeeping shall be required.

18 U.S.C. § 923(c). The information that the Secretary requires be recorded is specified in 27 C.F.R. § 178.125a (4):

> [T]he licensee enters the sale or other disposition of the firearm from the personal firearms collection into a bound record, . . . showing the date of the sale or other disposition, the name and address of the transferee, or the name and license number of the transferee if such person is a licensee, and the date of birth of the transferee if other than a licensee. In addition, the licensee shall cause the transferee, if other than a licenesee, to be identified in any manner customarily used in commercial transactions (e.g., a drivers license), and shall note on the record the method used.

We agree with the NRA that the regulation is invalid to the extent it requires licensees to record information not called for by the statute. The regulation requires licensees to record in their personal bound book the license number of the transferee if the transferee is a licensee, and the method of identification used if the transferee is a nonlicensee. This information is not required to be recorded by the statute. To the contrary, the statute explicitly provides that "no other recordkeeping shall be required" other than that specified in the statute. As a matter of policy, one might conclude that the identity of an individual can best be ascertained through a driver's license or, in the case of a licensee, a license number. However, Congress explicitly indicated that the place of residence and date of birth of an individual transferee and the business addresses of a corporate transferee were

to constitute the appropriate means of identification for purposes of a licensee's personal collection. Clearly, in other sections of the statute Congress knew how to grant the Secretary authority to promulgate reasonable regulations with respect to numerous transactions in firearms. *See, e.g.*, 18 U.S.C. §§ 923(g)(1)(A), (g)(2), (j). These sections, however, deal with transactions involving firearms contained in business collections. In the specific section dealing with firearms contained in personal collections, Congress forbade the imposition of additional record-keeping by the Secretary. Congress could hardly have been more clear in its direction that "no other record-keeping shall be required." While the information requested in the regulation may well be beneficial to BATF in its efforts to track firearm dispositions, the plain language of the statute makes clear that this is information that Congress did not wish licensees to be required to record. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The regulation is therefore invalid to the extent it requires that licensees record these additional items not specified in 18 U.S.C. § 923(c).[4]

Thus, we uphold the requirement in 27 C.F.R. § 178.125a that licensees record the receipt and disposition of all firearms in their personal collections, but invalidate that portion of the regulation requiring licensees to record additional information not called for by the statute.

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[4] The regulation also contains a requirement that licensees record the date of sale of firearms from their personal collections. While recordation of the date of sale is not explicitly listed as a record-keeping requirement in the statute, it is inherent in the statute's requirement that sales be recorded that the date of sale also be specified. The requirement of 27 C.F.R. § 178.125a(4) that licensees record the date of sale of personal firearms in their personal bound books is therefore consistent with the language of 18 U.S.C. § 923(c).

D.

FOPA directs that licensed collectors maintain "records of the receipt, sale, or other disposition" of curio and relic firearms. 18 U.S.C. § 923(g)(2). To implement this statutory provision, the Secretary promulgated a regulation requiring that licensed collectors record the receipt and disposition of curio and relic firearms, and that

> [i]n addition, before commencing or continuing a firearms curio or relic collection, each licensed collector shall inventory the curios or relics possessed in such collection and shall record same in the record required by this paragraph.

27 C.F.R. § 178.125(f).

The NRA complains that this regulation imposes additional recordkeeping requirements on licensed collectors that were not contemplated by the statute. It argues that the statute only requires that licensed collectors record the receipt or disposition of curios and relics, but that the regulation impermissibly expands on this requirement by insisting that licensed collectors record all curios and relics already in their possession when they acquire their licenses.

We agree that 27 C.F.R. § 178.125(f) impermissibly expands on the requirements of the statute. The statute makes no mention of any requirement that licensed collectors inventory their preexisting collections and record their contents. Rather, it makes clear that records need only be kept concerning the receipt and disposition of curios and relics. The Secretary's regulation creates a whole new recordkeeping requirement above and beyond the requirements provided for by the plain language of the statute.

The Secretary protests that when a collector is issued a collector's license, he may be deemed to have "received" those curios and relics already in his possession. This

argument for a sort of "constructive receipt" stretches the language of the statute "to the breaking point." *FCC v. American Broadcasting Co.*, 347 U.S. 284, 294 (1954). "Receipt" and "possession" simply do not have the same meaning. This court and others have recognized in similar contexts that the two terms are not synonymous. *See United States v. Goerlich*, 729 F.2d 1168, 1170 (8th Cir. 1984); *United States v. Burton*, 629 F.2d 975, 977 (4th Cir. 1980). The Secretary's interpretation would change the statute from one that focuses upon transactions in firearms to one that focuses on simple possession. To insist that a collector maintain records of the curios and relics already in his possession before he obtains a license, as does 27 C.F.R. § 178.125 (f), is thus to place a gloss on the statute which is not supported by the statute's plain language. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987).

The Secretary also contends that to strike down this regulation would interfere with his ability to assure accurate accounting of a collector's curios and relics. He points out that if licensees are not required to record firearms already in their possession when they acquire their licenses, it will be difficult for BATF inspectors to determine whether the collector properly recorded each firearm disposed of and whether such firearms were disposed of lawfully. While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute. The policy arguments forwarded by the Secretary with respect to enforcement "should be directed to the Congress rather than to [the courts]." *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963). Because the statute requires only that licensed collectors record the *receipt*, *sale*, or *other disposition* of curios and relics, and not that they inventory and record curios and relics already in their possession, 27 C.F.R. § 178.125(f) is invalid.

IV.

The NRA finally contends that all of the regulations must be invalidated because the Secretary failed to follow the procedures mandated in FOPA by refusing to afford interested parties an opportunity for an oral hearing.

FOPA contains no provision guaranteeing interested parties the right to an oral hearing. Instead, it provides:

> The Secretary shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing such rules and regulations.

18 U.S.C. § 926(b). It is well-settled that the requirement of a hearing does not necessitate that the hearing be oral. *See United States v. Florida East Coast Ry Co.*, 410 U.S. 224, 238-42 (1973); *A.T. & T. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978). Here, the Secretary, pursuant to regulation, reserved for himself the right to determine whether an oral hearing should be held. *See* 51 Fed. Reg. 39,635. He ultimately determined that an oral hearing was unwarranted, but did provide interested parties with the opportunity to submit written comments. This is all the hearing requirement in § 926(b) demands.

The NRA points to the fact that the Secretary conducted a public oral hearing in 1968 soon after enactment of the Gun Control Act, and argues that this demonstrates that the Secretary believed that an oral hearing was mandated by the Act. We are not persuaded. That the Secretary may once have chosen to accord parties additional procedural rights by holding an oral hearing "does not carry the necessary implication that [he] felt [he] was required to do so." *Florida East Coast Ry.*, 410 U.S. at 236 n.6. The choice to provide an oral hearing on one occasion does not bind the Secretary to continue to do so in the future. Thus, we hold that the

Secretary complied with the hearing requirement of § 926(b) by permitting interested parties to submit written comments on the proposed regulations.

V.

For the foregoing reasons, we hold that the regulations defining "business premises" and "gun show" are rational and consistent with the Gun Control Act as amended, and are therefore valid exercises of the Secretary's rulemaking authority. Likewise, the regulation requiring that licensees maintain records concerning the receipt and disposition of their personal firearms, and not merely those personal firearms transferred from their business inventories, is also reasonable and proper; however, to the extent that regulation requires licensees to record information not specified in the statute, the regulation is invalid. The regulation directing licensed collectors not only to record the receipt, sale, or other disposition of curio and relic firearms, but also to inventory and record all curio and relic firearms already in their possession when they obtained their licenses, is inconsistent with the plain language of the statute and is to that extent invalid. Thus, the judgment of the district court is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART

[Filed October 11, 1990]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-3345

NATIONAL RIFLE ASSOCIATION, a not for profit corporation; SOUTH CAROLINA SHOOTING ASSOCIATION, a not for profit corporation; GREENVILLE GUN CLUB, a corporation; PALMETTO GUN CLUB, a not for profit association; ROBLEY MOORE; WILLIAM P. GOODMAN; CALIFORNIA RIFLE AND PISTOL ASSOCIATION, a not for profit corporation; TEXAS STATE RIFLE ASSOCIATION, a not for profit association; UNIFIED SPORTSMEN OF FLORIDA, a not for profit association,

Plaintiffs-Appellants

v.

NICHOLAS F. BRADY, SECRETARY, DEPARTMENT OF THE TREASURY; STEPHEN E. HIGGINS, DIRECTOR OF BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. DEPARTMENT OF TREASURY, in his official capacity,

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Sprouse and Judge Garbis, United States District Judge sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:88-2518-8

NATIONAL RIFLE ASSOCIATION, *et al.*,
Plaintiffs

-v-

NICHOLAS F. BRADY, in his official capacity as the Secretary of the Treasury; and STEPHEN E. HIGGINS, in his official capacity as the Director of the Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury,
Defendants

ORDER

[Filed Aug. 15, 1989]

On December 12, 1988, the trial of the instant matter, having been consolidated with plaintiffs' motion for a preliminary injunction pursuant to Rule 65(b) and order of this court, was held before the court. Heard by the court on this date, too, were oral arguments on defendants' motion to dismiss, or in the alternative, for summary judgment.

The court has considered all memoranda, affidavits and exhibits submitted by the parties in support of and in opposition to the above motions and in connection with the trial of the case, as well as oral argument and testimony given on December 12, 1988. Pursuant to this court's oral rulings of December 12, 1988,

IT IS HEREBY ORDERED AND ADJUDGED:

1. With respect to the definition of "business premises" contained in 27 C.F.R. § 178.11, defendants' motion for summary judgment is granted;

2. With respect to the definition of "manufacture" contained in 27 C.F.R. § 178.11, the court declares this regulation to be arbitrary and capricious and unlawful, and, therefore, sets it aside pursuant to 5 U.S.C. § 706, and enters a permanent injunction against its enforcement by defendants;

3. With respect to 27 C.F.R. § 100, pertaining to Gun Shows, defendants' motion for summary judgment is granted;

4. With respect to 27 C.F.R. § 178.125(f), pertaining to record keeping of the receipt and disposition of "curios and relics," defendants' motion for summary judgment is granted;

5. With respect to 27 C.F.R. §§ 178.125(e) and 178.125a, defendants' motion for summary judgment is granted;

6. With respect to the Bureau of Alcohol, Tobacco and Firearms (BATF)'s promulgation of temporary regulations on October 29, 1986, 51 Fed.Reg. 39612-34, defendants' motion for summary judgment is granted;

7. With respect to BATF's promulgation of final regulations on March 31, 1988, 53 Fed.Reg. 10480, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Charleston, South Carolina

August 15, 1989

/s/ Sol Blatt, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:88-2518

NATIONAL RIFLE ASSOCIATION, a not for profit corporation; SOUTH CAROLINA SHOOTING ASSOCIATION, a not for profit corporation; GREENVILLE GUN CLUB, a corporation; PALMETTO GUN CLUB, a not for profit association; ROBLEY MOORE; WILLIAM P. GOODMAN; CALIFORNIA RIFLE AND PISTOL ASSOCIATION, a not for profit corporation; TEXAS STATE RIFLE ASSOCIATION, a not for profit association; UNIFIED SPORTSMEN OF FLORIDA, a not for profit association,

Plaintiffs,

-vs-

NICHOLAS F. BRADY, in his official capacity as the Secretary of the Treasury of the United States; and STEPHEN E. HIGGINS, in his official capacity as the Director of the Bureau of Alcohol, Tobacco and Firearms, U.S. Department of Treasury,

Defendants.

JUDGMENT

[Filed Aug. 16, 1989]

This action came to trial before the Court with the Honorable Sol Blatt, Jr., United States District Judge presiding. The issue have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

1. With respect to the definition of "business premises" contained in 27 C.F.R. § 178.11, defendants' motion for summary judgment is granted;

2. With respect to the definition of "manufacture" contained in 27 C.F.R. § 178.11, the court declares this regulation to be arbitrary and capricious and unlawful, and, therefore, sets it aside pursuant to 5 U.S.C. § 706, and enters a permanent injunction against its enforcement by defendants;

3. With respect to 27 C.F.R. § 100, pertaining to Gun Shows, defendants' motion for summary judgment is granted;

4. With respect to 27 C.F.R. § 178.125(f), pertaining to record keeping of the receipt and disposition of "curios and relics," defendants' motion for summary judgment is granted;

5. With respect to 27 C.F.R. § 178.125(e) and 178.125a, defendants' motion for summary judgment is granted;

6. With respect to the Bureau of Alcohol, Tobacco and Firearms (BATF)'s promulgation of temporary regulations on October 29, 1986, 51 Fed.Reg. 39612-34, defendants' motion for summary judgment is granted;

7. With respect to BATF's promulgation of final regulations on March 31, 1988, 53 Fed.Reg. 10480, defendants' motion for summary judgment is granted.

Dated this 16th day of August, 1989 in Charleston, South Carolina.

ANN A. BIRCH
Clerk

/s/ Judith M. McDowell
Deputy

STATUTES AND REGULATIONS

Preamble, Firearms Owners' Protection Act, § 1, P.L. 99-308, 100 Stat. 449 (May 19, 1986):

CONGRESSIONAL FINDINGS—The Congress finds that—

(1) the rights of citizens—

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

18 U.S.C. § 922(c):

In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who

does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—. . . .

18 U.S.C. § 923(c):

Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer. If any firearm is so disposed of by a licensee within one year after its transfer from his business inventory into such licensee's personal collection or if such disposition or any other acquisition is made for the purpose of willfully evading the restrictions placed upon licensees by this chapter, then such firearms shall be deemed part of such licensee's business inventory, except that any licensed manufacturer, importer, or dealer who has maintained a firearm as part of a personal collection for one year and who sells or otherwise disposes of such firearm shall record the description of the firearm in a bound volume, containing the name and place of residence and date of birth of the transefree if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: *Provided*, That no other recordkeeping shall be required.

18 U.S.C. § 923(d)(1):

Any application submitted under subsection (a) or (b) of this section shall be approved if— . . .

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time. . . .

18 U.S.C. § 923(g)(1):

> Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale or other disposition, of firearms at his place of business for such period, and in such form, as the Secretary may by regulations prescribe. . . .

Section 923(j):

> A licensed importer, licensed manufacturer, or licensed dealer may, under rules or regulations prescribed by the Secretary, conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, State, or local organization, or any affiliate of any such organization devoted to the collection, competitive use, or other sporting use of firearms in the community, and such location is in the State which is specified on the license. . . . Nothing in this subsection shall authorize any licensee to conduct business in or from any motorized or towed vehicle. . . . Nothing in this subsection shall be construed to diminish in any manner any right to display, sell, or otherwise dispose of firearms or ammunition, which is in effect before the date of the enactment of the Firearms Owners' Protection Act.

18 U.S.C. Sec. 924(a):

> (1) Except as otherwise provided in paragraph (2) or (3) of this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—
>
> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any

license or exemption or relief from disability under the provisions of this chapter. . . .

(D) willfully violates any other provision of this chapter, shall be fined not more than $5,000, imprisoned not more than five years, or both, and shall become eligible for parole as the Parole Commission shall determine. . . .

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined not more than $1,000, imprisoned not more than one year, or both, and shall become eligible for parole as the Parole Commission shall determine.

18 U.S.C. Sec. 926(a):

The Secretary may only prescribe such rules and regulations as are necessary to carry out the provisions of this chapter, including—

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of his license; and

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection. . . .

27 C.F.R. § 71.41(d)(2)(iii)(B):

ATF Rulings published in the Bulletin do not have the force and effect of Department of the Treasury

Regulations (including amendatory Treasury decisions) but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision may be relied on, used, or cited by any officer or employee of the Bureau as a precedent in the disposition of other cases.

27 C.F.R. § 178.11:

Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. . . .

Business premises. The property on which the manufacturing or importing of firearms or ammunition or the dealing in firearms is or will be conducted. A private dwelling, no part of which is open to the public, shall not be recognized as coming within the meaning of the term. . . .

27 C.F.R. § 178.100:

(a) A licensee may conduct business temporarily at a gun show or event as defined in paragraph (b) if the gun show or event is located in the same State specified on the license. . . .

(b) A gun show or an event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use or other sporting use of firearms in the community. . . .

27 C.F.R. § 178.125(e):

(e) *Firearms receipt and disposition by licensed dealers.* Except as provided in Section 178.124a with respect to alternate records for the receipt and disposition of firearms by dealers, each licensed dealer shall enter into a record each receipt and disposition of firearms. . . .

The record shall show the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge of the firearm.

The sale or other disposition of a firearm shall be recorded by the licensed dealer not later than 7 days following the date of such transaction.

When such disposition is made to a nonlicensee, the firearms transaction record, Form 4473, obtained by the licensed dealer, shall be retained until the transaction is recorded, separate from the licensee's Form 4473 file, and be readily available for inspection. . . .

The record shall show the date of the sale or other disposition of each firearm, the name and address of the person to whom the firearms is transferred, or the name and license number of the person to whom transferred if such person is a licensee, or the firearms transaction record Form 4473 serial number, if the licensed dealer transferring the firearm serially numbers the Forms 4473 and files them numerically. . . .

27 C.F.R. § 125a:

Personal Firearms Collection.

(a) Notwithstanding any other provision of this subpart, a licensed manufacturer, licensed importer,

or licensed dealer is not required to record on a firearms transaction record, Form 4473, the sale or other disposition of a firearm maintained as part of the licensee's personal firearms collection:

Provided, that:

(1) The licensee has maintained the firearms as part of such collection for 1 year from the date the firearm was transferred from the business inventory into the personal collection or otherwise acquired as a personal firearm;

(2) The licensee recorded in the bound record prescribed by § 178.125(e) the receipt of the firearm into the business inventory or other acquisition;

(3) The licensee recorded the firearm as a disposition in the bound record prescribed by § 178.125(e) when the firearm was transferred from the business inventory into the personal firearms collection or otherwise acquired as a personal firearm; and

(4) The licensee enters the sale or other disposition of the firearm from the personal firearms collection into a bound record, under the format described below, identifying the firearms transferred by recording the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge, and showing the date of the sale or the disposition, the name and address of the transferee, or the name and license number of the transferee if such person is a licensee, and the date of birth of the transferee if other than a licensee.

In addition, the licensee shall cause the transferee, if other than a licensee, to be identified in any manner customarily used in commercial transactions (e.g., a drivers license), and shall note on the record the method used.